Supreme Court, U.S.
FILED
APR 6 1994
OFFICE OF THE CLERK

No. 93-1246

In the Supreme Court of the United States

OCTOBER TERM, 1993

CASCADE GENERAL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in ordering petitioner to reimburse its employees for union dues and initiation fees exacted pursuant to an unlawful agreement with a union, notwithstanding that petitioner had remitted those sums to the union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

ABF Freight System, Inc. v. *NLRB*, 114 S. Ct. 835 (1994)	6
Hughes & Hatcher, Inc. v. *NLRB*, 393 F.2d 557 (6th Cir. 1968)	9
Intalco Aluminum Corp. v. *NLRB*, 417 F.2d 36 (9th Cir. 1969)	10
International Ladies' Garment Workers' Union v. *NLRB*, 366 U.S. 731 (1961)	8
Local 60, United Brotherhood of Carpenters v. *NLRB*, 365 U.S. 651 (1961)	8
Local 1814, Int'l Longshoremen's Ass'n v. *NLRB*, 735 F.2d 1384 (D.C. Cir.), cert. denied, 469 U.S. 1072 (1984)	7
NLRB v. *Hi-Temp, Inc.*, 503 F.2d 583 (7th Cir. 1974)	7
NLRB v. *Mears*, 437 F.2d 502 (3d Cir. 1970)	9
NLRB v. *Raymond Buick, Inc.*, 445 F.2d 644 (2d Cir. 1971)	7
Radio Officers' Union v. *NLRB*, 347 U.S. 17 (1954)	7
Sheraton-Kauai Corp. v. *NLRB*, 429 F.2d 1352 (9th Cir. 1970)	7
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984)	6
Virginia Electric & Power Co. v. *NLRB*, 319 U.S. 533 (1943)	5, 6
Wisniewski v. *United States*, 353 U.S. 901 (1957)	10

Statutes: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 7, 29 U.S.C. 157 3
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3, 4, 7
§ 8(a)(2), 29 U.S.C. 158(a)(2) 3, 7
§ 8(a)(3), 29 U.S.C. 158(a)(3) 7
§ 10(c), 29 U.S.C. 160(c) 6

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-51a) is reported at 9 F.3d 731. The decision and order of the National Labor Relations Board (Pet. App. 52a-68a) and the decision of the administrative law judge (Pet. App. 69a-216a) are reported at 303 N.L.R.B. 656.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1993. A petition for rehearing was denied on November 2, 1993. Pet. App. 217a-218a. The petition for a writ of certiorari was filed on January 31, 1994. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1985, petitioner commenced operations as a ship, tug, and barge repair business in Vancouver, Washington, which is directly across the Columbia River from metropolitan Portland, Oregon. Pet. App. 82a. In the summer of 1987, petitioner acquired the assets of Dillingham Ship Repair (Dillingham), one of the principal firms operating at the Portland Ship Repair Yard (Repair Yard). Petitioner relocated its operations to Dillingham's former facility at the Repair Yard. *Id.* at 14a & n.3, 73a-74a, 76a, 83a, 108a. In the mid-1980s, employers operating at the Repair Yard, including Dillingham, developed a practice of negotiating collective-bargaining agreements jointly with the Metal Trades Council of Portland & Vicinity and the Pacific Coast Metal Trades Council (collectively, MTC).[1] *Id.* at 12a, 78a. In late June and early July 1987, MTC met with petitioner to acquaint it with MTC's traditional role at the Repair Yard and to pursue a mutually acceptable labor agreement. *Id.* at 124a-125a. Those discussions broke off, however, when, on July 31, 1987, petitioner recognized a local union of the Oil, Chemical, and Atomic Workers (OCAW) as the exclusive bargaining representative of its employees. *Id.* at 55a, 79a, 126a, 130a-133a. Petitioner determined that a majority of its employees had signed authorization cards, but it had only 16 individuals on its payroll at the time. On September 24, 1987, petitioner and OCAW executed a labor contract contain-

[1] Dillingham ceased operations in 1987 as a consequence of its inability to negotiate a renewal of its labor contract with MTC. Pet. App. 76a-77a.

ing a union security clause and a check-off provision, which required petitioner to withhold and remit to OCAW deductions from employees' wages for initiation fees and monthly dues. *Id.* at 14a-16a. Within a few months, petitioner's workforce grew dramatically, rising to nearly 500 employees by the end of 1987. *Id.* at 37a, 120a n.28.

2. On September 9, 1987, MTC filed an unfair labor practice charge against petitioner with the National Labor Relations Board (Board) and, on November 30, 1987, the Board's General Counsel issued a complaint alleging that petitioner's recognition of OCAW violated Section 8(a)(2) and (1) of the National Labor Relations Act (Act).[2] Pet. App. 70a-71a. After a hearing, an administrative law judge (ALJ) concluded that petitioner's recognition of OCAW violated Section 8(a)(2), because "a representative complement was not in [petitioner's] employ at the time of the recognition based on a card check."[3] *Id.* at 189.

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[2] Section 8(a)(2), 29 U.S.C. 158(a)(2), in relevant part, makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]" of the Act, 29 U.S.C. 157.

[3] The ALJ found that petitioner learned in mid-to-late July 1987 that the director of a trust created to sell Dillingham's assets had accepted its bid to purchase Dillingham for $1.6 million; that "such an audacious step would only be undertaken with a serious intent at business growth"; that "the business momentum was with [petitioner]" during the summer of 1987 to fill "[t]he void created by [Dillingham's] elimination"; and that, on December 30, 1987, petitioner advised the United States Navy's Military Sealift Command that it had a current (and "normal") workforce of 200 skilled and 100 unskilled employees, with a "potential maximum" of 800 skilled and 200 unskilled employees. Pet. App. 108a, 120a n.28,

Further, the ALJ concluded that petitioner violated Section 8(a)(1) by maintaining and enforcing the union security and dues check-off provisions of the OCAW contract. *Id.* at 206a-207a. To remedy petitioner's unfair labor practices, the ALJ ordered petitioner, *inter alia*, to reimburse, with interest, present and former employees for all initiation fees and dues paid by them pursuant to the OCAW contract.[4] *Id.* at 209a.

The Board affirmed the ALJ's unfair labor practice findings, finding that it was petitioner's "plan—in existence at the time it recognized OCAW—to expand its operations to require, in normal times, levels of employment many times greater than the size of its work force at the time of recognition." Pet. App. 62a-63a. The Board also upheld the ALJ's reimbursement order. *Id.* at 52a-67a. It noted, however, that "[petitioner] need not reimburse any employees who voluntarily joined OCAW before September 24, 1987, the date the contract became effective." *Id.* at 63a n.21.

3. The court of appeals affirmed the Board's unfair labor practice findings and enforced its remedial order. Pet. App. 1a-33a. The court explained that "[a]n employer commits an unfair labor practice in violation of [Section] 8(a)(1) and (2) of the [Act] * * * by recognizing a union as the collective bargaining representative and entering into a contract with such union at a time

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184a, 185a. Moreover, the ALJ found that, when petitioner recognized OCAW on July 31, 1987, petitioner "was looking ahead to burgeoning operations, and [was] possessed of an intention not to have dealings with MTC as had contributed so traumatically to the closure of [Dillingham.]" *Id.* at 188a.

[4] The ALJ also ordered petitioner to withdraw recognition from OCAW, and to cease giving effect to the OCAW contract and any renewal, modification, or extension thereof. Pet. App. 207a-208a.

when the employer [does] not have a representative complement of employees." *Id.* at 18a. The court concluded that "[t]he record clearly supports the Board's findings that [petitioner] expected with reasonable certainty that its work force would increase substantially within a short period of time" after its recognition of OCAW.[5] *Id.* at 24a-25a.

The court of appeals rejected petitioner's contention that, even though its recognition of OCAW violated the Act, it should not have to reimburse employees for their union initiation fees and dues that it withheld pursuant to the OCAW contract, because it had turned those sums over to OCAW. Pet. App. 25a-26a. The court observed that "[t]he Board has broad discretion in fashioning remedies to effectuate the policies of the Act in light of the circumstances of each case." *Id.* at 26a. The court concluded that, in the circumstances presented, "the Board's order is rational in effectuating the policies of the [Act] and should be enforced." *Id.* at 30a. The court explained that reimbursement " 'promotes the policies of the National Labor Relations Act by assisting in completely disestablishing the illegally constituted union, severing its connection with the employer, restoring freedom of choice to the employee, and encouraging the employee to exercise his rights under the Act.' " *Id.* at 31a (quoting *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943)).

Judge Rymer dissented in part. Although she agreed with the majority that substantial evidence supported the Board's unfair labor practice findings, in her view the Board's reimbursement order was "a punitive

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[5] Petitioner does not challenge the finding of an unfair labor practice in this Court. Pet. 6.

measure that is beyond the Board's remedial powers." Pet. App. 33a-34a.

ARGUMENT

1. Petitioner contends (Pet. i, 8, 15) that, since petitioner merely acted as a "conduit" in transmitting union initiation fees and dues to OCAW, the Board's order requiring it to reimburse the employees for those sums, as a remedy for petitioner's unfair labor practice in recognizing the union, is punitive and is not entitled to enforcement. There is no merit to that contention.

Section 10(c) of the Act, 29 U.S.C. 160(c), vests the Board with "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-899 (1984); see *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994) (Board's remedial orders "merit the greatest deference"). In *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 541 (1943), the Court found "manifestly reasonable" a Board order that required an employer to reimburse employees for dues collected unlawfully. In that case, the employees had been compelled to pay dues to a union that the employer had unlawfully created and to which it had accorded closed-shop and check-off privileges. Even though the employer had remitted those sums to the union, the Court sustained the reimbursement order, explaining that such an order "returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company whose unfair labor practices brought about the situation." *Ibid.*

Contrary to petitioner's contention (Pet. 16), *Virginia Electric* is directly applicable here, notwithstanding that OCAW, unlike the union there, was not "company domi-

nated." Petitioner unlawfully recognized an independent union and entered into a union-security clause requiring the employees to pay dues and fees to the union as a condition of continued employment. That recognition and entry into a labor contract constitute "support" that is proscribed by Section 8(a)(2) and (1) of the Act. Moreover, the union security clause warrants the inference that those employees who "joined" the union after execution of the agreement may well have been motivated by the compulsion of the unlawful union-security clause.[6] Accordingly, in this situation, no less than in the case of a company-dominated union, the Board, with court approval, has ordered that the employees be reimbursed for fees and dues withheld from them under the unlawful union security agreement. See, *e.g.*, *Local 1814, Int'l Longshoremen's Ass'n* v. *NLRB*, 735 F.2d 1384, 1404-1405 (D.C. Cir.), cert. denied, 469 U.S. 1072 (1984); *NLRB* v. *Hi-Temp, Inc.*, 503 F.2d 583, 586-587 (7th Cir. 1974); *NLRB* v. *Raymond Buick, Inc.*, 445 F.2d 644, 645 (2d Cir. 1971); *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1357-1358 (9th Cir. 1970).

The fact that MTC elected not to file an unfair labor practice charge against OCAW, so that the Board had no jurisdiction over the union party to the unlawful agreement with petitioner, does not deprive the Board of authority to direct a reimbursement order against petitioner alone. In *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 54 (1954), the Court rejected a similar contention. There, the Board required a union to reimburse employees who had been unlawfully discharged at the

[6] The first proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), authorizes the employer to enter into a union-security agreement only with a union that represents a majority of the employees in an appropriate bargaining unit.

union's behest, when the offending employer had not been joined in the case and therefore was not compelled to share financial liability for the discharges. The Court explained that "[i]t does not follow that because one form of remedy is not available or appropriate in a case, as here, that no remedy should be granted." *Ibid.* In this case as well, the Board may seek to restore the employees to the position they would have occupied, if they had not been unlawfully compelled to support OCAW, even though the Board does not have jurisdiction over one of the joint tortfeasors.

Petitioner's claim (Pet. 17) that the Board's reimbursement order conflicts with *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961), is incorrect. In that case, while the employer had entered into a labor contract with a minority union, the contract did not include any union-security provision. See *id.* at 734. The Court's observation, *id.* at 740, that "no penalty is attached to the [employer's] violation" referred to the fact that, because the labor contract did not require employees to join the union or pay union dues, the Board's remedy had been limited to requiring that the employer withhold recognition from the minority union and cease giving effect to the contract. *Id.* at 735, 739-740.[7]

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[7] The Board's reimbursement order in this case is also consistent with this Court's decision in *Local 60, United Brotherhood of Carpenters* v. *NLRB*, 365 U.S. 651 (1961). In that case, the Court set aside a reimbursement order issued against a union because there was no reasonable inference that the payments had been coerced by the unlawful agreement, since "[a]ll of the employees affected by the present order were union members when employed on the job in question." *Id.* at 654. By contrast, in this case OCAW purported to represent only ten employees who signed authorization cards prior to its recognition by petitioner. Pet. App. 130a.

2. Petitioner contends (Pet. 9-10) that the court of appeals' decision conflicts with *NLRB* v. *Mears*, 437 F.2d 502 (3d Cir. 1970), and *Hughes & Hatcher, Inc.* v. *NLRB*, 393 F.2d 557 (6th Cir. 1968). In *Mears*, the court declined to enforce the Board's reimbursement order based on two factors: (1) the General Counsel's failure to issue a complaint against the union enabled it to retain the employees' dues; and (2) the Board's remedial order directed the employers involved to continue making royalty payments to a separate union welfare fund to finance future employee benefits, which the court found was "a more substantial focus for employee interest in the [union] than the dues." 437 F.2d at 513. The latter element does not exist in this case.

In *Hughes & Hatcher*, "the record [did] not disclose" whether the employer was holding the initiation fees and dues "in escrow" pending the court's decision, or had already remitted those sums to the unlawfully assisted union. 393 F.2d at 567-568. In dictum, the court opined (without addressing this Court's decisions in *Virginia Electric* or *Radio Officers' Union*) that, if the latter scenario were correct, "then the Board's order should be directed against that union and not against [the employer]." 393 F.2d at 568. The Sixth Circuit has not addressed the reimbursement issue squarely since *Hatcher & Hatcher*, nor has that court subsequently

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To the extent that they signed cards voluntarily, those employees are not entitled to reimbursement under the Board's order. *Id.* at 63a n.21. The reimbursement order applies only to the other employ-ees who joined OCAW *after* the contract and the coercive thrust of its union-security clause became effective.

applied the dictum of that decision to deny enforcement of a Board reimbursement order.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994

[8] Petitioner also claims (Pet. 10-16) that the decision in this case is inconsistent with the Ninth Circuit's prior decision in *Intalco Aluminum Corp.* v. *NLRB*, 417 F.2d 36 (1969). A claimed intracircuit conflict does not warrant this Court's attention, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), and, in any event, the court of appeals explained why the two cases are distinguishable. See Pet. App. 29a (noting that petitioner, unlike the employer in *Intalco*, knew that its business was expanding when it recognized the union, and was not found to have acted in good faith in prematurely recognizing the union).